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Mecomb Malaysia Sdn Bhd v VST M&E Sdn Bhd

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HIGH COURT (PENANG) — ORIGINATING SUMMONS NO PA-24C-06–10 OF 2017
LIM CHONG FONG J
14 MARCH 2018

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Building and Construction Law — Construction Industry Payment and Adjudication Act 2012 — Application to stay adjudication decision under CIPAA — Defendant applied to stay enforcement of adjudication decision by plaintiff contending adjudicator had committed breach of natural justice in failing to take defendant's set off into account in his decision — Defendant also contended plaintiff was financially incapable of repaying adjudicated sum if defendant succeeded in its civil suit against plaintiff — Whether defendant's statement of final account could not constitute 'set off' in adjudication as it was only raised after notice of adjudication was filed — Whether defendant never took any action under the CIPAA to challenge the adjudication decision if convinced there was clear error on adjudicator's part or in his decision — Whether plaintiff had proven it had financial capacity to repay adjudicated sum if defendant succeeded in its civil suit — Whether no special circumstances or error in adjudication decision had been shown to warrant grant of stay

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The defendant had appointed the plaintiff as a subcontractor in a project. A dispute arose between the parties over monies owing under progress payments. The plaintiff referred the dispute for adjudication under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). After a hearing, the adjudicator decided in the plaintiff's favour ('the decision'). Dissatisfied with the decision, the defendant filed a civil suit ('the suit') against the plaintiff. In the meantime, the plaintiff applied to the High Court under s 28 of the CIPAA to enforce the decision. The defendant's instant application was to stay the enforcement of the decision on the ground, inter alia, that the adjudicator had committed a breach of natural justice by failing to consider the defendant's statement of final account of the value of work done by the plaintiff. That statement dated 20 April 2017 was claimed as a set off by the defendant in the adjudication. The defendant also argued that the plaintiff's financial standing was poor and it was incapable of repaying the defendant the adjudicated sum (about RM3m) if the defendant succeeded in the suit. The plaintiff counter-argued that the defendant had not shown any special circumstances to warrant a stay; that the plaintiff was financially secure and able to repay the adjudicated sum and that despite alleging that the decision contained clear and unequivocal errors, the defendant had never applied to set aside the decision under s 15 of the CIPAA.

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Held, dismissing the stay application:

(1) The defendant had failed to prove a clear error or commission of breach of natural justice on the part of the adjudicator or in his decision; nor had it shown any special circumstances to warrant a stay of the enforcement of the decision (see paras 38 & 44).

(2) The notice of adjudication was filed on 17 April 2017. The defendant's statement of final account was only issued on 20 April 2017 or even later (which statement, together with its supporting details and documents, was not produced in the defendant's affidavits in the instant application). Since the defendant's statement of final account was non-existent when the notice of adjudication was issued, it was not a set off that had accrued in defence to the plaintiff's payment claim. In other words, it was not an adjudicatable defence within the core jurisdiction of the adjudicator. In the circumstances, the adjudicator not only did not fall into error but was actually correct in refusing to assume jurisdiction to entertain the defendant's statement of final account. As stated by the adjudicator, the position might have been different if the defendant had issued such a negative penultimate payment certificate after payment certificate No 15 and before the issuance of the notice of adjudication by the plaintiff (see paras 31 & 36–37).

(3) If the defendant was convinced of a clear error on the part of the adjudicator or in his decision, it should have actively challenged the decision under s 15(b) and/or (d) of the CIPAA but did not do so. It was insufficient for the defendant to rely on a passive challenge in aid of a stay as was done in the instant application (see paras 31–32).

(4) From the financial information available, the defendant was only able to show that the plaintiff had suffered a loss of about RM6m in the 2016 financial year as compared to a profit of about RM6.5m in the 2015 financial year and that it was indebted to financial institutions at a gearing ratio of 1.89. It was not uncommon for commercial entities to borrow from financial institutions for investment and/or working capital. All these did not per se mean that the plaintiff would be unable to repay the defendant if the latter succeeded in the suit. The plaintiff was not insolvent. Its current assets minus current liabilities figure stood at RM11,352,242; it had a retained profit of about RM14m, and its net worth was about RM16,321,040. The plaintiff was also indirectly owned by the Sime Darby Group, one of the largest public-listed conglomerates in Malaysia. The plaintiff was certainly in a position to be able to repay the adjudicated sum of only RM3,043,842.60 if the defendant succeeded in its suit (see paras 40–42).

[Bahasa Malaysia summary

Defendan telah melantik plaintif sebagai subkontraktor dalam projek. Pertikaian berbangkit di antara pihak-pihak terhadap wang yang kena dibayar di bawah bayaran kemajuan. Plaintif merujuk pertikaian tersebut untuk adjudikasi di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta'). Selepas pendengaran, pengadil memutuskan memihak plaintif ('keputusan'). Tidak puas hati dengan keputusan, defendan memfailkan tindakan sivil ('tindakan') terhadap plaintif. Sementara itu, plaintif memohon kepada Mahkamah Tinggi di bawah s 28 Akta untuk menguatkuasakan keputusan tersebut. Permohonan defendan ini adalah untuk menangguhkan penguatkuasaan keputusan atas alasan, antara lain, bahawa pengadil telah melakukan pelanggaran keadilan semula jadi kerana gagal untuk mempertimbangkan penyata akaun muktamad defendan terhadap nilai kerja yang dilakukan oleh plaintif. Penyata tersebut bertarikh 20 April 2017 didakwa sebagai *set off* oleh defendan dalam adjudikasi tersebut. Defendan juga berhujah bahawa kedudukan kewangan plaintif adalah lemah dan ia tidak berupaya membayar balik defendan jumlah penghakiman (kira-kira RM3 juta) jika defendan berjaya dalam tindakan. Plaintif menghujah balas bahawa defendan tidak menunjukkan apa-apa keadaan khas untuk mewajarkan penangguhan; bahawa plaintif adalah terjamin dari segi kewangan dan boleh membayar semula jumlah penghakiman dan meskipun mendakwa bahawa keputusan mengandungi kesilapan yang jelas dan nyata, defendan tidak pernah memohon untuk mengetepikan keputusan di bawah s 15 Akta tersebut.

Diputuskan, menolak permohonan penangguhan:

(1) Defendan telah gagal untuk membuktikan kesilapan yang jelas atau melakukan pelanggaran keadilan semulajadi oleh pihak pengadil atau dalam keputusannya; atau pun ia menunjukkan apa-apa keadaan khas untuk mewajarkan penangguhan penguatkuasaan keputusan tersebut (lihat perenggan 38 & 44).

(2) Notis adjudikasi difailkan pada 17 April 2017. Penyata akaun muktamad defendan hanya dikeluarkan pada 20 April 2017 atau kemudiannya (penyata yang mana, bersama dengan butiran dan dokumen sokongannya, tidak dikemukakan dalam afidavit-afidavit defendan dalam permohonan ini). Memandangkan penyata akaun muktamad defendan tidak wujud semasa notis adjudikasi dikeluarkan, ia bukan *set off* yang telah terakru dalam pembelaan kepada tuntutan bayaran plaintif. Dalam erti kata lain, ia bukan pembelaan yang boleh diadjudikasi dalam bidang kuasa utama pengadil. Dalam keadaan, pengadil bukan sahaja tidak membuat kesilapan tetapi sebenarnya betul kerana menolak untuk ambil alih bidang kuasa untuk mendengar penyata akaun muktamad defendan. Seperti yang dinyatakan oleh pengadil, kedudukan mungkin

menjadi berbeza jika defendan mengeluarkan sijil bayaran *penultimate* negatif sedemikian selepas sijil bayaran No 15 dan sebelum pengeluaran notis adjudikasi oleh plaintif (lihat perenggan 31 & 36–37).

(3) Jika defendan yakin terhadap kesilapan jelas oleh pihak pengadil dalam keputusannnya, ia sepatutnya secara aktif mencabar keputusan tersebut di bawah s 15(b) dan/atau (d) Akta tetapi tidak berbuat sedemikian. Ia tidak mencukupi untuk defendan bergantung ke atas cabaran pasif dalam membantu penangguhan seperti yang dilakukan dalam permohonan ini (lihat perenggan 31–32).

(4) Daripada maklumat kewangan yang ada, defendan hanya boleh menunjukkan bahawa plaintif mengalami kerugian lebih kurang sebanyak RM6 juta pada tahun kewangan 2016 berbanding kepada keuntungan lebih kurang sebanyak RM6.5 juta pada tahun kewangan 2015 dan bahawa ia berhutang kepada institusi-institusi kewangan pada nisbah gearing 1.89. Ia bukan tidak biasa untuk entiti komersial meminjam daripada institusi-institusi kewangan untuk pelaburan dan/atau modal kerja. Kesemua ini tidak sendiri bermaksud yang plaintif tidak dapat membayar semula defendan jika defendan berjaya dalam tindakan tersebut. Plaintif bukan tidak solven. Jumlah aset semasanya tolak liabiliti semasanya berjumlah kepada RM11,352,242; ia mengekalkan keuntungan kira-kira RM14 juta, dan nilai bersihnya adalah kira-kira RM16,321,040. Plaintiff adalah juga dimiliki secara tidak langsung oleh Kumpulan Sime Darby, salah satu konglomerat tersenarai awam terbesar di Malaysia. Plaintif semestinya dalam kedudukan yang boleh membayar semula jumlah yang dihakimkan hanya sejumlah RM3,043,842.60 jika defendan berjaya dalam tindakannya (lihat perenggan 40–42).]

Notes

For cases on building and construction law in general, see 1(3) *Mallal's Digest* (5th Ed, 2015) paras 4216–4286.

Cases referred to

Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd (No 2) [2016] 1 LNS 581, HC (refd)

Industrial & Commercial Realty Co Ltd v Merchant Credit Pte Ltd [1980] 1 MLJ 208 (refd)

Pilon Ltd v Breyer Group Plc [2010] EWHC 837 (TCC), QBD (distd)

Subang Skypark Sdn Bhd v Arcradius Sdn Bhd [2015] 11 MLJ 818, HC (refd)

Teguh Wiramas Sdn Bhd v Thien Seng Chan Sdn Bhd and another application [2017] MLJU 633, HC (refd)

View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22, FC (distd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 6, 7, 7(3), 15, 15(b), (d), 16, 16(1)(b), 28
Limitation Act 1953 s 31

Elaine Siaw Yee Wan (Khor Yongshi with her) (Raja Darryl & Loh) for the plaintiff.
Ng Ziyang (The Chambers of Ng & Co) for the defendant.

Lim Chong Fong J:

INTRODUCTION

[1] This is an application to stay the enforcement of the adjudicator's decision pursuant to the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA').

[2] The plaintiff is private limited company and the claimant in the adjudication proceedings ('adjudication') held before Mr Kuhendran Thanapalasingam ('adjudicator'). The plaintiff is a wholly owned subsidiary of Sime Darby Industrial Sdn Bhd and is a member of the Sime Darby Group of Companies.

[3] The defendant is also a private limited company and the respondent in the adjudication.

SALIENT FACTS

[4] The defendant is the main contractor for the Cadangan Pembinaan Bangunan Hospital Swasta 8 Lapis Serta 1 Lapis Separa Bawah Tanah Dan 1 Lapis Besmen di atas Lot 3963 di Kampung Batu Buruk, Mukim Batu Buruk, Kuala Terengganu, Terengganu Darul Iman project ('project').

[5] The plaintiff is the electrical subcontractor to the defendant in the project by virtue of a subcontract evidenced by a letter of award dated 22 May 2013 ('subcontract').

[6] The project is completed on 15 May 2016 but payment disputes and differences arose between the parties pursuant to the subcontract that were referred to the adjudication.

[7] The adjudicator on 7 September 2017 made his decision ('decision') in favour of the plaintiff by ordering as follows:

(a) the defendant shall pay to the plaintiff the sum of RM579,407.05 with interest at 5%pa from 8 July 2015 until the date of this decision;

(b) the defendant shall pay to the plaintiff the sum of RM826,717.66 with interest at 5%pa from 20 November 2015 until the date of this decision;

(c) the defendant shall pay to the plaintiff the sum of RM855,051.28 with interest at 5%pa from 19 July 2016 until the date of this decision;

(d) the defendant shall pay to the plaintiff the sum of RM247,510.70 with interest at 5%pa from 21 February 2017 until the date of this decision;

(e) the defendant shall pay to the plaintiff the sum of RM266,250 with interest at 5%pa from 14 July 2016 until the date of this decision;

(f) the defendant shall pay the sums above together with the interest within 14 days from the date of this decision and thereafter shall pay interest on the sums above at the rate of 5%pa from the date of this decision until the date of payment;

(g) the defendant shall within 14 days from the date of this decision pay to the plaintiff the plaintiff's costs in the sum of RM30,689; and

(h) the defendant shall pay and bear the adjudicator's fees, GST and expenses in the sum of RM47,660.44 and KLRCA's administrative fees and GST in the sum of RM9,335.42 and to the extent that the plaintiff has paid any part thereof, the defendant shall within 14 days from the date of this decision reimburse the plaintiff with the amount paid.

[8] The defendant is dissatisfied with the decision and has on 25 September 2017 filed Penang High Court Civil Suit No PA-22NCVC-191–09 of 2017 against the plaintiff ('suit').

[9] In the meantime, the plaintiff filed Penang High Court Originating Summons No PA-24C-06–10 of 2017 against the defendant to enforce the decision against the defendant pursuant to s 28 of the CIPAA ('originating summons').

[10] In consequence, the defendant filed a notice of application dated 9 November 2017 to stay the enforcement of the decision ('application').

[11] The affidavits that were filed for purposes of this application are as follows:

(a) the defendant's affidavit in support affirmed by Thum Kong Leong on 7 November 2017;

(b) the plaintiff's affidavit in reply affirmed by Lee Yit Hing on 24 November 2017;

(c) the defendant's affidavit in reply affirmed by Thum Kong leong on 6 December 2017; and

(d) the plaintiff's affidavit in reply No 2 affirmed by Lee Yit Hing on 21 December 2017.

[12] After having read the cause papers and written submissions filed by the parties, I heard oral arguments of counsel on 2 February 2018. I thereafter adjourned my decision for deliberation on the arguments put forth.

[13] After having duly done so, I hereby give my decision below together with the supporting grounds.

CONTENTIONS OF THE PARTIES

[14] The defendant contended that the plaintiff acted in an unjust and inequitable manner by filing this originating summons to enforce the decision after the defendant had already filed the suit to have their disputes and differences finally determined. The defendant was led to do so by the plaintiff and in consequence the plaintiff must accordingly be estopped from contesting this application to preserve the financial status quo that currently stood between the parties. Reliance is made by the defendant on the Singapore case of *Industrial & Commercial Realty Co Ltd v Merchant Credit Pte Ltd* [1980] 1 MLJ 208.

[15] That notwithstanding, the defendant contended that the application for stay of the enforcement of the decision is subject to the special circumstances test rather than merely the financial stringency test as adopted in *Subang Skypark Sdn Bhd v Arcradius Sdn Bhd* [2015] 11 MLJ 818.

[16] In this respect, the defendant argued that the adjudicator committed a breach of natural justice in the making of the decision by refusing to consider the final account adjustment of the final value of work done. It was claimed as a set off by the defendant in the adjudication as set out in its statement of final account as at 20 April 2017. There is hence a clear error in the decision and this ought to be taken into account in this application for stay of enforcement of the decision following the recent Federal Court case of *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22.

[17] Furthermore, the defendant argued that the plaintiff's financial standing is poor because it suffered a loss of RM5,889,275 for the year 2016. Based on the CTOS search on the plaintiff, the plaintiff's financial standing experienced deterioration because the plaintiff experienced a profit of RM6,431,028 for the year 2015. In addition, the plaintiff's gearing ratio

currently stood at 1.89. As the result, the defendant is fearful that the plaintiff would not be able to re-pay the defendant if the latter eventually succeeds in the suit.

[18] On the other side, the plaintiff contended that there is no justification and merit whatsoever in the defendant's application. It is contended that the recent Federal Court case of *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* merely gave a more liberal interpretation of s 16 of the CIPAA in that the financial status or capability to repay is a factor but not the only factor for a stay to be granted. The Federal Court also stressed that a stay ought not to be given readily and caution must be exercised in so doing.

[19] The plaintiff hence contended firstly that the commencement of the suit did not form any part of the consideration on merits or special circumstances following *Subang Skypark Sdn Bhd v Arcradius Sdn Bhd* and *Teguh Wiramas Sdn Bhd v Thien Seng Chan Sdn Bhd and another application* [2017] MLJU 633.

[20] Secondly, the plaintiff is financially secure as evidenced from the SSM search report on the plaintiff as well as its audited financial statement. In this respect, the plaintiff has total assets of RM47,192,137 comprising of current assets of RM41,743,308 and non current assets of RM5,448,829. It has retained profits of RM13,821,039. The plaintiff's current financial position is in fact better off than at the time the defendant awarded the subcontract to the plaintiff. That notwithstanding, the adjudicated sum is merely RM3,043,842.60 and it is clear that the plaintiff is in the position to repay the defendant if ordered to do so in the suit.

[21] Thirdly, the plaintiff contended that there were no clear and unequivocal errors in the decision and in this regard, the defendant did not apply to set aside the decision pursuant to s 15 of the CIPAA. In addition, the plaintiff submitted that the defendant's grievances ought properly to be addressed in the suit.

[22] Consequently, the plaintiff submitted that justice lies in favour of the stay not to be granted following *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd (No 2)* [2016] 1 LNS 581.

FINDINGS OF THE COURT

[23] The governing provisions including the threshold requirement for this application is prescribed in s 16 of the CIPAA which reads:

> (1) A party may apply to the High Court for a stay of an adjudication decision in the following circumstances:

(a) an application to set aside the adjudication decision under section 15 has been made; or

(b) the subject matter of the adjudication decision is pending final determination by arbitration or the court.

(2) The High Court may grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the KLRCA or make any other order as it thinks fit.

[24] In the recent Federal Court case of *View Esteem Sdn Bhd v Bina Puri Holdings Bhd*, Zulkefli Ahmad Makinudin PCA held as follows:

[81] From observations made on the laws from the other jurisdictions, an adjudication award can be reviewed and challenged in a variety of ways. A stay application in other jurisdictions is made only when the other avenues for review and challenge to the award are exhausted. It therefore makes sense that applications for stay in other jurisdictions are rarely granted. We are of the view that it is however not right to rely on those decisions to justify restricting the statutory power of stay in Malaysia simply on the financial status of the other party. CIPAA contains no such restriction.

[82] We are in agreement with the contention of the appellant that a more liberal reading of s 16 of the CIPAA would allow some degree of flexibility to the courts to stay the award where there are clear errors, or to meet the justice of the individual case. It is accepted that a stay of the award ought not be given readily and caution must be exercised when doing so. However to restrict the application of s 16 of the CIPAA in the manner proposed by the High Court, and the Court of Appeal, would be to strip it of any utility.

[25] First and foremost, I am satisfied that the defendant has met the stay threshold requirement set out in s 16(1)(b) of the CIPAA by having filed the suit which is presently still pending completion. Nevertheless there is no provision in the CIPAA that the enforcement of the decision under s 28 of the CIPAA is either automatically stayed or that the plaintiff is estopped from so enforcing after the defendant has commenced the suit to have the disputes and differences finally determined pursuant to s 16 of the CIPAA.

[26] I will next deal with the issue of alleged breach of natural justice and error in the decision as raised by the defendant.

[27] According to the defendant, the adjudicator failed to deal with the set off raised pursuant to the defendant's statement of final account as at 20 April 2017 in the adjudication. In this regard, it is contended that the adjudicator wrongfully found and held as follows in paras 30–32 of his decision:

30. On the issue of the value of work being subject to remeasurement, the Respondent shows a statement of final account as at 20.4.17 which includes a remeasurement showing omissions and additions in respect of the contract and

provisional sums. It also shows a final works contract sum and deductions for back charges and liquidated damages. The statement of final account prepared by the Respondent shows an amount due from the Claimant to the Respondent. Based on this the Respondent submitted that in reality it is the Claimant who owes the Respondent and not the other way round.

31. The Claimant accepts that the final contract sum is subject to remeasurement at the final account stage but says that that does not affect the validity of payment certificates and progress claims submitted before that. The Claimant contended that the issue of adjustment at final account stage is irrelevant to the present proceedings and that the determination of final account is not within the jurisdiction of this adjudication and issues relating to adjustments being made via the final account should be excluded from consideration.

32. I accept the Claimant's contentions in this respect. The dispute is in relation to the progress payment certificates and progress claims and I will not consider the state of final account between the parties including the remeasurement by the Respondent to produce a final figure which should have been done at the final account stage. The Respondent ought to have valued the works done in progress claims it had done for other progress claims. There is nothing to indicate that the Respondent was unable to do so ...

[28] In the Federal Court case of *View Esteem Bhd v Bina Puri Holdings Bhd*, Zulkefli Ahmad Makinudin PCA also held as follows:

[64] It follows that the 'duty and obligation of the adjudicator' as spelt out in s 24(c) of the CIPAA that 'he shall comply with the principles of natural justice' would oblige him to consider all the defences raised by the appellant in its adjudication response as a matter of fairness and impartiality.

[65] We are of the view that an adjudicator who wrongly rules out considering a defence presented to him would be in breach of natural justice. This point arose in *Pilon Ltd v Breyer Group plc* [2010] EWHC 837 (TCC) which like in our present case was concerned with progress claims that were cumulative in nature. The decision by Justice Coulson bears close reading. At [24]–[28] the learned judge observed:

24. It seems to me clear beyond doubt that the adjudicator erred in failing to take into account Breyer's defence by reference to the over-payment on batches 1–25. Whilst he was quite correct to regard the notice of adjudication as setting out the boundaries of his jurisdiction, he failed to appreciate that what Pilon were seeking by that notice was not only an interim valuation of batches 26–62, but also an interim payment of any sum considered owing to them. Whilst the valuation required him to have regard to batches 26–62 only, the concomitant claim for payment meant that the adjudicator was obliged to consider whether Breyer were right to say that a much smaller net payment was due than that contended for by Pilon, because Pilon had already been overpaid on batches 1–25. In other words, the notice of adjudication gave the adjudicator the jurisdiction to consider what, if any, further sum should be paid by way of interim payment from Breyer to Pilon and that issue, of necessity, involved a

consideration of Breyer's defence based on the alleged over-payment on batches 1–25.

25. It is not uncommon for adjudicators to decide the scope of their jurisdiction solely by reference to the words used in the notice of adjudication, without having regard to the necessary implications of the words: that was, for example, what went wrong in Broardwell. Adjudicators should be aware that the notice of adjudication will ordinarily be confined to the claim being advanced; it will rarely refer to the points that might be raised by way of a defence to that claim. But, subject to questions of withholding notices and the like, a responding party is entitled to defend himself against a claim for money due by reference to any legitimate available defence (including set-off), and thus such defences will ordinarily be encompassed within the notice of adjudication.

26. As a result, an adjudicator should think very carefully before ruling out a defence merely because there was no mention of it in the claiming party's notice of adjudication. That is only common sense: it would be absurd if the claiming party could, through some devious bit of drafting, put beyond the scope of the adjudication the defending party's otherwise legitimate defence to the claim.

27. I understand that it may be tempting for a claiming party in an adjudication to seek to limit the adjudicator's jurisdiction in a way in which that party believes to be to its advantage. I am in no doubt that is what happened here: Pilon did not wish the adjudicator to have any regard to batches 1–25, and therefore deliberately limited the scope of the adjudication notice to batches 26–62. It was their case that the over-payment claim was outside the adjudicator's jurisdiction, and that is what they (successfully) urged on the adjudicator. Thus, this is a case where Pilon sought a tactical advantage by putting forward an erroneous statement of the adjudicator's jurisdiction and, as the decision in *Quartzelec* shows that can be a dangerous tactic to adopt.

28. In the result therefore, I consider that the adjudicator deliberately placed an erroneous restriction on his own jurisdiction, which amounted to a breach of natural justice ...

66. Based on the above decision of *Pilon Ltd* the adjudicator had likewise in our case, wrongly construed the scope of his jurisdiction under s 27(1) of CIPAA in refusing to consider all the defences raised in the Adjudication Response. Therefore such a decision by the Adjudicator cannot stand.

[29] Nonetheless each case is still dependent upon its own facts. The similarity here with the case of *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 is that both adjudicators refused to entertain the respondent's cross claim of set off on jurisdictional ground. In other words, the adjudicators consider themselves not having the jurisdiction to do so.

[30] The Federal Court in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* held that the adjudicator committed breach of natural justice following *Pilon Ltd v Breyer Group plc* [2010] EWHC 837 (TCC) because the adjudicator therein simply did not consider the respondent's cross claims that resulted in

overpayment when he erroneously held he had no jurisdiction. This is by reason that the cross claims such as rectification costs of defects were not previously raised in the respondent's payment response pursuant to s 6 of the CIPAA.

[31] The facts herein are however distinguishable. Although the defendant disputed the plaintiff's payment claim in the payment response that the work done were being measured to produce a final figure, I noticed from the decision that the defendant's statement of final account which was ultimately produced is stated as at 20 April 2017. It must therefore have been made on that day or at a later date. This crucial statement of final account together with its supporting details and documents were however not produced in the defendant's affidavits in this application for my review.

Furthermore and in contrast with *View Esteem Sdn Bhd v Bina Puri Holdings Bhd*, the defendant herein did not actively challenge the decision grounded under Breyer Group Plc s 15(b) and/or (d) of the CIPAA. It was instead passively brought up in defence against the enforcement of the decision collateral to the suit filed by the defendant.

[32] As held by the Federal Court in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* that the applicant for a stay of the adjudicator's decision must demonstrate clear error, I therefore hold that if the complaint is breach of natural justice for wrongful refusal of the adjudicator to assume jurisdiction, then the complainant such as the defendant here must make the active challenge under s 15 of the CIPAA against the error. It is insufficient in my opinion merely to rely on a passive challenge in aid of a stay as done herein in this application.

[33] Be that as it may and more importantly, it has to be proven by the defendant that there was a clear error on the part of the adjudicator or in his decision. In this respect and notwithstanding the absence of the crucial statement of final account relied upon by the defendant before me, I gather from para 30 of the decision that the alleged statement of final account comprised of three components, to wit, the final works contract sum and deductions for back charges and liquidated damages. In this respect, it does not seem to be in dispute that the adjudicator dealt with the deductions of back charges and liquidated damages in paras 44–58 of his decision. The sole complaint of the defendant is that pertaining to the final works contract sum or more accurately, the final value of work done by the plaintiff.

[34] The payment claim and adjudication claim launched by the plaintiff is for progress payments in that the defendant failed to pay under payment certificates No 14 and 15 as well as failed to certify progress claims Nos 16, 17 and 18. As in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd*, the defence

herein is that the progress claim did not stand alone in separate compartments but were cumulative in nature. It is therefore still subject to the final value of work done upon completion of the subcontract as evidenced by the defendant's statement of final account.

[35] That notwithstanding, I noticed that Zulkefli Ahmad Makinudin PCA also held as follows in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* with emphasis added by me:

> [72] *This means that the adjudicator must look to the 'notice of adjudication' to first determine the jurisdiction of the dispute that is referred to them*. This is made clear in *Pilon Ltd* itself as at paras 24 and 25 of the judgment. It is also incorrect to say that the present case is different from *Pilon Ltd* because *Pilon Ltd* was dealing with an accounting of previous payments. In *Pilon Ltd* the excluded defence was one of overpayment and an accounting of what was due. In the present case before the court, one of the appellant's excluded defences was an overpayment of RM2m which was not accounted for.

[36] The notice of adjudication in the adjudication was filed on 17 April 2017. However the defendant's statement of final account was only issued on 20 April 2017 or even later. In this regard, s 7 in particular s 7(3) of the CIPAA provides as follows:

> 7 Right to refer dispute to adjudication
>
> (1) An unpaid party or a non-paying party may refer a dispute arising from a payment claim made under section 5 to adjudication.
>
> (2) The right to refer a dispute to adjudication shall only be exercised after the expiry of the period to serve a payment response as specified under subsection 6(3).
>
> (3) A dispute referred to adjudication under this Act is subject to the Limitation Act 1953 [Act 254], Sabah Limitation Ordinance [Cap 72] or Sarawak Limitation Ordinance [Swk Cap 49] as the case may be.

It is provided in s 31 of the Limitation Act 1953 as follows:

> 31 Provisions as to set off or counterclaim
>
> For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

[37] Consequently and since the defendant's statement of final account was non-existent when the notice of adjudication was issued, it wasn't a set off that had accrued in defence of the plaintiff's payment claim. In other words, it wasn't an adjudicatable defence within the core jurisdiction of the adjudicator. In the circumstances, I find and hold that the adjudicator not only didn't fall into error but was actually correct in refusing to assume jurisdiction to

entertain the defendant's statement of final account. As stated by him, the position might be different if the defendant had issued such as a negative penultimate payment certificate after payment certificate No 15 before the issuance of notice of adjudication by the plaintiff.

[38] In the premises, I find and hold that the defendant failed to prove there was either breach of natural justice on the part of the adjudicator or clear error seen in the decision.

[39] I will next move on to the financial status or standing of the plaintiff. The relevant test and its considerations are that as applied by Lee Swee Seng J in *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd (No 2)* as follows with emphasis added by me:

> [62] The following guidelines propounded by Justice Peter Coulson QC in the *Wimbledon Construction Company*'s case are helpful in deciding how discretion for stay of a judgment that has proceeded from an adjudication decision ought to be exercised having in mind always the special circumstances of each case:
>
> > 26. In a number of the authorities which I have cited above the point has been made that each case must turn on its own facts. Whilst I respectfully agree with that, it does seem to me that there are a number of clear principles which should always govern the exercise of the court's discretion when it is considering a stay of execution in adjudication enforcement proceedings. Those principles can be set out as follows:
> >
> > a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a *quick and inexpensive method of arriving at a temporary result in a construction dispute*.
> >
> > b) In consequence, *adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money*.
> >
> > c) In an application to stay the execution of summary judgment arising out of an Adjudicator's decision, the Court must exercise its discretion under Order 47 with considerations a) and b) firmly in mind (see *AWG*).
> >
> > d) *The probable inability of the claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances* within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay (see *Herschell*).
> >
> > e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see *Bouygues* and *Rainford House*).
> >
> > f) Even if the evidence of the claimant's present financial position

suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

(i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see *Herschell)*; or

(ii) The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see *Absolute Rentals*). (Emphasis added.)

[63] It would appear that about the only special circumstance in the context of justifying a stay of execution of such a judgment would be when there is cogent evidence pointing to a reasonable probability that the successful claimant might not be in a position to pay back the judgment sum should the respondent in the adjudication succeed on appeal or that the claimant is already in liquidation.

[40] From the financial information available, the defendant is only able to show that the plaintiff suffered a loss of about RM6m in the financial year of 2016 as compared to a profit of about RM6,500,000 in the financial year of 2015. In addition, the plaintiff is indebted to financial institutions at a gearing ratio of 1.89. It is not uncommon for commercial entities to borrow from financial institutions for investment and/or working capital. In my view, these do not per se mean that the plaintiff is unable to repay the defendant in the event the defendant eventually succeeds in the suit.

[41] The plaintiff is certainly not insolvent. The current assets minus the current liabilities of the plaintiff company is RM11,352,242.

[42] As shown by the plaintiff from the same financial information, it still has a retained profit of about RM14m. The plaintiff's net worth is RM16,321,040 and the plaintiff is certainly able to repay the adjudicated amount of only RM3,043,842.60 if the defendant should succeed in the suit.

Furthermore the plaintiff's financial position is now presently stronger than when the defendant awarded the subcontract to the plaintiff in May 2013. As asserted by the plaintiff, since the defendant was willing to trust the plaintiff to have the financial capability to execute work worth RM10,650,000 notwithstanding that the defendant's financial position was then weaker, there is no reason why the defendant is now doubting the plaintiff's current stronger financial capability to repay the lower adjudicated sum of only RM3,043,842.60. In addition, the plaintiff is indirectly owned by the Sime Darby Group, one of the large public listed conglomerate companies in Malaysia.

[43] There is therefore no special circumstances whether financial or otherwise shown by the defendant from the evidence adduced before me.

CONCLUSION

[44] For the foregoing reasons, I find that the defendant has neither raised a clear error on the part of the adjudicator or in his decision nor special circumstances to warrant a stay of the enforcement of the decision.

[45] Consequently, this application is disallowed with costs of RM4,500.

Stay application dismissed

Reported by Ashok Kumar